

In the matter between:

WALTER SISULU UNIVERSITY

Appellant

and

SINAZO GWELE

Respondent

JUDGMENT

Bloem J.

[1] On 12 June 2014 a single judge ordered the appellant to confer the degree of Bachelor of Commerce in Economics (the B Comm Econ degree) on the respondent at a subsequent congregation (graduation function), that the appellant be ordered to issue the respondent with a certificate for the B Comm Econ degree upon its conferment on her and that the appellant pay the costs of the application, such costs to include the costs consequent upon the employment of two counsel. The court *a quo* dismissed the appellant's application for leave to appeal. The appellant appeals to this court with the leave of the Supreme Court of Appeal.

[2] For the sake of convenience I shall first set out the material facts upon which the respondent relied for the relief sought and granted

whereafter I shall deal with the appellant's facts. In 2010 the respondent commenced her studies towards the B Comm Econ degree at the appellant. At the beginning of 2013 she registered at the appellant to study towards the B Comm (Honours) Econ degree. When she prepared for the conferment of the B Comm Econ degree on her at a graduation function of the appellant on 10 and 11 May 2013, she learned on 7 May 2013 that her name did not appear on the list of candidates upon whom degrees were to be conferred. The degree was indeed not conferred on her during the graduation function on 10 and 11 May 2013.

[3] On 28 May 2013 the respondent was informed by Glory Willard, the appellant's administrator of the Faculty of Business, Management Sciences and Law, that the degree could not be conferred on her because she did not complete two computer literacy modules (CLT 1101 and 1202) which, she was told, were requirements for the B Comm Econ degree. The respondent contacted Carl Anyangiwe, the Acting Executive Dean of the appellant's Faculty of Business, Management Sciences and Law, who referred her to Tembeka Ndlwana, the Acting head of the Department of Economics. Ms Ndlwana told the respondent "*to deregister for Honours*". The respondent addressed a letter dated 21 May 2013 to Prof Anyangiwe (at the latter's request) "*with the hope that [her] problem will be fixed*".

[4] In the meeting attended by a member(s) of the student representative council, Ms Ndlwana, Ms Willard, Prof Anyangiwe and the respondent, Ms Ndlwana stated that no student ever graduated without completing

the computer literacy modules. The respondent said that she knew of another student on whom the appellant conferred the B Comm Econ degree during 2011 after he had completed all the necessary courses at the end of 2010, save for the computer literacy modules. In due course the respondent furnished Prof Anyangiwe with the academic record of that graduate. The response was that, when that graduate registered for the B Comm Econ degree, the completion of the computer literacy modules was not compulsory.

[5] On 20 June 2013 the respondent wrote an examination in Monetary Economics and on 28 June 2013 she wrote an examination in Advanced Economics. Her script in the former was marked by the relevant examiner but her script in Advanced Economics was not marked. On 22 July 2013 the warden of the house in which the respondent was accommodated requested her to vacate her room because, so she was told, her room had been cancelled. The house warden requested her to hand in the key to her room but she refused to do so.

[6] The respondent saw her attorney who addressed a letter dated 22 July 2013 to the appellant wherein the latter was advised to refrain from evicting the respondent from her room, to withdraw its “*conduct to deregister*” the respondent, to enrol her for the B Comm (Honours) Econ degree and to allow the respondent to do the computer literacy modules concurrently with the B Comm Econ (Honours) degree, failing which the court would be approached for appropriate relief. Since there was no response to the letter from her attorney, the respondent

launched an urgent application in the court *a quo*. On 26 July 2013 the court *a quo* issued a rule *nisi* calling upon the appellant to show cause:

- 6.1. why it should not be interdicted from deregistering the respondent as a B Comm (Honours) Econ student and from evicting her from her room;
- 6.2. why the computer literacy modules should not “*be added in the 2013 curriculum in respect of the [respondent]*”
- 6.3. why the appellant should not be directed:
 - 6.3.1. to confer the B Comm Econ degree on the respondent during the September 2013 graduations; and
 - 6.3.2. to issue the respondent with the degree certificate on conferment.

[7] After the rule *nisi* was issued various affidavits were filed on behalf of the appellant. The main answering affidavit was deposed to by Fozia Madhi, the appellant’s Director of Legal Services. Except for dealing with the merits of the respondent’s claim, the appellant also raised two points *in limine*, namely that the matter was not urgent and that the respondent should have instituted proceedings for the judicial review of the appellant’s administrative action in terms of the provisions of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000)(PAJA). In view of the conclusion at which I arrive in this appeal, it is unnecessary to deal with the issue of urgency.

[8] On the merits, Ms Madhi stated that it is a compulsory requirement for any student who studies towards the B Comm Econ degree to attend lectures, submit assignments and pass the examinations of the computer literacy modules. Ms Ndlwana stated that she repeatedly reminded all third year B Comm Econ students that the satisfactory completion of the computer literacy modules was a compulsory requirement. She furthermore stated that she admitted the respondent to the B Comm (Honours) Econ degree on the assumption that she had met all the requirements for the degree and on the basis that her pass mark in Economics III was over 60%. That, she said, was an error because the respondent had not met all the requirements of the degree. She furthermore stated that the computer literacy modules are the only ones which the respondent required to complete in order to qualify for the conferment of the B Comm Econ degree on her. Prof Anyangiwe went further. He stated that, at a meeting held with the respondent, she conceded that she was aware that she had to complete the compulsory computer literacy modules to satisfy all the requirements for the conferment of the B Comm Econ degree, but when she attempted to register therefor she was unable to do so as they were already fully subscribed.

[9] In reply the respondent denied that she was ever advised that it was compulsory to complete the computer literacy modules for the conferment of the B Comm Econ degree. To the contrary, she stated that she was informed that she had passed the B Comm Econ degree whereupon she decided to apply to study towards the B Comm

(Honours) Econ degree. The appellant allowed her to register for that degree, something that could be done only upon successful completion of the B Comm Econ degree.

[10] On 14 November 2013 the court *a quo*, after hearing submissions on the merits on the application, concluded that it could not resolve the issue quoted hereunder and ordered that it be referred to the hearing of oral evidence, namely *“whether the courses appearing as fundamentals in the [appellant’s] 2010 Prospectus are compulsory courses for the B Comm Economics degree as the [appellant] contends or they are not as the [respondent] contends.”*

[11] When the matter came before the court *a quo* on 29 April 2014 for it to hear oral evidence, counsel for the respondent, with reference to *Wallach v Lew Geffen Estates CC* 1993 (3) SA 258 (AD), submitted that, despite the interlocutory order that was granted on 14 November 2013, it was open to the court *a quo* to hold that it was unnecessary to hear oral evidence on the issue that was referred for the hearing of oral evidence on the basis that the issue so referred was not raised in the affidavits. The respondent opposed the application for the matter to be decided on the papers without the hearing of oral evidence on the above issue. After the hearing of submissions by counsel, the court *a quo* held that it was unnecessary to hear oral evidence and that it would decide the matter on the papers. Having heard the parties, the court *a quo* granted the order referred to in paragraph one above.

[12] The legislation applicable to this appeal is section 65B (2)(b) of the Higher Education Act, 1997 (Act No. 101 of 1997) which provides that no degree may be conferred by a public higher education institution upon any person who has not completed the work and attained the standard of proficiency determined through assessment as required by the senate of the public higher education institution. The appellant made an institutional statute in accordance with section 32 of the Higher Education Act which statute came into operation on 26 August 2008. In terms of paragraph 65 (2)(b) of the statute no degree may be conferred upon any person who has not met all the requirements for the conferment of a degree as prescribed by the appellant's senate and laid down in the rules.

[13] The above facts show that the appellant made at least two decisions, the first being not to confer the B Comm Econ degree on the respondent without her completing the computer literacy modules and the second being to deregister the respondent as a B Comm (Honours) Econ student because she had not met all the requirements for the B Comm Econ degree to be conferred on her. Mr de la Harpe, counsel for the appellant, submitted that, because the appellant exercised a public power and performed a public function authorised by the Higher Education Act and its statute when it made the decision not to confer the B Comm Econ degree on the respondent, the respondent should have instituted proceedings for the judicial review of that decision in terms of section 6 as read with section 8 of PAJA. Mr Zilwa SC, who with Ms Ncalo appeared on behalf of the

respondent, conceded that the respondent would have been in a better position if she had sought the judicial review of the appellant's decision not to confer the B Comm Econ degree on her. In my view that concession was correctly made. It is the respondent's case that the appellant was wrong to make the decision not to confer the B Comm Econ degree on her. That decision exists in fact. To undo that decision the respondent should challenge it on review. *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye and Laser* 2014 (3) SA 481 (CC) at 507E-513E. Mr Zilwa submitted however that the failure to institute proceedings for the judicial review of that decision was not fatal because the facts support the relief sought, namely an interdict and mandamus. The appellant's decision not to confer the B Comm Econ degree on the respondent is, in my view, crucial in this appeal and was also crucial for the success or otherwise of the application in the court *a quo*. That decision stands, irrespective of whether it was procedurally fairly made or whether it has substantive validity. It stands until it is set aside by a court in proceedings for judicial review. *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* 2004 (6) SA 222 (SCA) at 242A-247A.

[14] The appellant's decision has consequences. One of the consequences of that decision is that the respondent cannot register for the B Comm (Honours) Econ degree because she can only register for that degree once she has completed all the requirements of the B Comm Econ degree.

[15] A further consequence of that decision for the respondent is that, for

as long as it stands, the respondent is not entitled to any of the relief sought in paragraph 2 of the notice of motion, namely that the appellant be interdicted from deregistering the respondent as a B Comm (Honours) Econ student, that the appellant be interdicted from evicting the respondent from the room in which she is accommodated while she is a B Comm (Honours) Econ student, that *“the alleged outstanding computer literacy modules 1101 and 1102 (sic) be added”* to the work that the respondent must do as a B Comm (Honours) Econ student, that the appellant confer the B Comm Econ degree on the respondent and that the appellant issue the respondent with a certificate indicating that the B Comm Econ degree has been conferred on her. The relief sought in paragraph 2 of the notice of motion was premised on the basis that the respondent was entitled to the conferment of the B Comm Econ degree. Until the appellant’s decision (not to confer the B Comm Econ degree on the respondent) is set aside, the B Comm Econ degree cannot be conferred on her. She was accordingly not entitled to the relief set out in paragraph 2 of the notice of motion. That is the paragraph in the notice of motion which contains the main relief sought by the respondent, paragraph 1 thereof dealing with urgency and paragraph 3 thereof dealing with costs. If she was not entitled to the relief set out in paragraph 2 of the notice of motion her application should have been dismissed.

- [16] Regarding the interdict, the respondent’s case is that she completed all the requirements for the B Comm Econ degree and that it should accordingly be conferred on her whereas the appellant’s case is that

she has not completed all the required courses, the computer literacy courses being outstanding.

[17] The court *a quo* found that the issue was whether the respondent had completed the courses for the B Comm Econ degree to be conferred on her. She held that the answer was to be found in the appellant's 2010 Prospectus "*which governed the entire program of the degree concerned*". She later repeated the issue by identifying it as "*whether the [respondent] had made out a case that she met the requirements of the degree, as required and provided in the 2010 Prospectus*".

[18] In my view the issue is whether the completion of the computer literacy modules is a requirement for the B Comm Econ degree. It is not in dispute that the respondent did not complete those modules. Accordingly, if it is found that the completion of the computer literacy modules is a requirement then the appeal must be upheld because the respondent would then not have completed all the requirements for the conferment of the B Comm Econ degree. If, on the other hand, it is found that the completion of those modules is not a requirement then the appeal must be dismissed because the respondent would then have met all the requirements for the conferment of the B Comm Econ degree.

[19] In passing I point out that although the issue which I have identified in the preceding paragraph was also identified by the parties before the institution of the application, the respondent did not pertinently state that the two computer literacy modules were not a requirement for the

B Comm Econ degree to be conferred on her. Since that was the issue one would have expected her to do so. Mr Zilwa referred to a paragraph in the respondent's founding affidavit which he submitted must be read to mean that the two computer literacy modules were not a requirement of the B Comm Econ degree. In that paragraph the respondent stated that she was surprised when Ms Willard informed her that she did not study "*computer literacy which, according to her, was a requisite for the Bachelor of Commerce in Economics degree*". According to the respondent she informed Ms Willard that the appellant would not have admitted her to register for the Honours degree if she had an outstanding module and "*that her conclusions were wrong*". It is not clear from that paragraph or the context of the respondent's founding affidavit to which conclusions she referred. According to that paragraph Ms Willard made two statements as a matter of fact. The first was that the respondent did not study computer literacy, a fact which is not in dispute. The second statement of fact was that the completion of the computer literacy modules was a requirement of the B Comm Econ degree. Ms Willard did not draw any conclusion from those facts. In my view that paragraph cannot be read to mean that the respondent stated that the computer literacy modules were not a requirement of the B Comm Econ degree. Even if I deal with this appeal on the assumption that the respondent stated in that paragraph what Mr Zilwa submitted, for the reasons set out hereunder, the appeal must be upheld.

[20] The respondent sought a final interdict in the court *a quo*. At some

stage the court *a quo* referred for oral evidence an issue which was similar but not the same as the issue identified by me in the preceding paragraph. In *Plascon-Evans Paints v van Riebeeck Paints* 1984 (3) SA 623 (AD) Corbett JA set out the general rule to be applied in these circumstances as follows at 634 H – 635 C:

"It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact (see in this regard *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* [1949 \(3\) SA 1155 \(T\)](#) at 1163 - 5; *Da Mata v Otto* NO 1972 (3) SA 858 (A) at 882D - H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5) (g) of the Uniform Rules of Court (*cf Petersen v Cuthbert & Co Ltd* 1945 AD 420 at 428; *Room Hire* case *supra* at 1164) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg *Rikhoto v East Rand Administration Board and Another* [1983 \(4\) SA 278 \(W\)](#) at 283E - H). Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers (see the remarks of BOTHA AJA in the *Associated South African Bakeries* case, *supra* at 924A)."

- [21] As pointed out above, it is the appellant's case that the respondent was repeatedly informed of the compulsory nature of the computer literacy modules. In this regard reference is made to the evidence of Ms Ndlwana who stated that she reminded all third year B Comm Econ students to register for the computer literacy modules, being a requirement of that degree. Surprisingly, in her replying affidavit the respondent did not deny Ms Ndlwana's evidence in that regard. Instead she invited the court's attention to, what she termed as, Ms Ndlwana's careless statement in that regard.

Absent a denial, Ms Ndlwana's evidence stands unchallenged and must be accepted.

[22] I also refer to the evidence of Prof Anyangiwe who stated that at a meeting with the respondent "*she conceded that she was aware that she had to complete the compulsory computer literacy courses but that when she attempted to register for the courses she was unable to do so as the courses were already fully subscribed*". In reply the respondent denied that she made that confession to Prof Anyangiwe. The appellant does not offer a bare denial that the respondent met all the requirements of the B Comm Econ degree. That denial is supported by the evidence of *inter alia* Prof Anyangiwe. Although his version is denied by the respondent, I cannot describe Prof Anyangiwe's denial of the respondent's allegation (that she met all the requirements of the B Comm Econ degree) as so far-fetched or clearly untenable that it justifies a rejection merely on the papers. On the basis of the general rule set out in the *Plascon-Evans Paint* case I have to accept the facts set out in the affidavits of Ms Ndlwana and Prof Anyangiwe. Those facts are that the computer literacy modules are compulsory requirements for the B Comm Econ degree. It is common cause that the respondent did not complete those modules. In terms of the Higher Education Act and the appellant's statute the B Comm Econ degree can accordingly not be conferred on her. In the circumstances, the appeal must be upheld.

[23] There is no reason why the costs of the appeal should not follow the result, such costs to include the costs of the application for leave to

appeal to the court *a quo* and the Supreme Court of Appeal. Regarding the costs of the application in the court *a quo*, although the application should have been dismissed, it does not follow that the appellant is entitled to the costs thereof. The respondent was not properly treated by the appellant. She was allowed to register for the B Comm (Honours) Econ degree at the beginning of 2013 after the appellant had represented to her that she had complied with all the requirements for the B Comm Econ degree. It was only a few days before the graduation ceremony in May 2013 that the respondent was informed that the computer literacy modules were still outstanding. In the light of the appellant's above conduct I would not grant her the costs of the application. In the circumstances, a fair order would be that each party pay her or its own costs of the application in the court *a quo*.

[24] In the result, the following order is made:

24.1. the appeal is upheld with costs, such costs to include the costs of the application for leave to appeal to the court *a quo* and the Supreme Court of Appeal; and

24.2. the order of the court *a quo* is set aside and replaced with the following:

"The application is dismissed with each party to pay her or its own costs of the application".

I agree

L P PAKADE

Judge of the High Court

I agree

J ROBERSON

Judge of the High Court

For the appellant :

Adv de la Harpe instructed by Drake
Flemmer & Orsmond (EL) Inc, East London

For the respondent :

Adv Zilwa SC and Adv Ncalo instructed by
Makhangela Mtungani Inc, Mthatha

Date of hearing :

11 September 2015

Date of delivery of the judgment :

23 September 2015